

Calendar No. 546

109TH CONGRESS }
2d Session }

SENATE

{ REPORT
109-303

FEDERAL ENERGY REGULATORY COMMISSION PROJECT 7307 LICENSE REINSTATEMENT

JULY 31, 2006.—Ordered to be printed

Mr. DOMENICI, from the Committee on Energy and Natural
Resources, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 2028]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 2028) to provide for the reinstatement of a license for a certain Federal Energy Regulatory Commission project, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

On page 2, strike lines 11 through 15 and insert the following:

“(c) REINSTATEMENT OF TERMINATED LICENSE.—If a license of the Commission for the project has been terminated before the date of enactment of this Act, the Commission shall—

“(1) reinstate the license effective as of the date of the termination of the license; and”.

PURPOSE OF THE MEASURE

The purpose of S. 2028 is to reinstate the license to construct and operate the Tygart Dam Project in Taylor County, West Virginia and to extend the time required for commencement of construction until December 31, 2007.

BACKGROUND AND NEED

Section 13 of the Federal Power Act (FPA) requires that the construction of a licensed project commence within two years from the date the license is issued. The Federal Energy Regulatory Commission (FERC or Commission) is authorized under the FPA to extend this deadline once, for a maximum of two additional years, upon a finding that such extension is “not incompatible with the public interest.” Consequently, a license is subject to termination if a licensee fails to begin construction within four years after the date the license is issued, unless legislation authorizing an additional extension is enacted.

On September 27, 1989, FERC granted the City of Grafton, West Virginia, an original license to construct and operate the Tygart Dam Project No. 7307 (Tygart Project or Project). The 20-MW Project was to be located on the Tygart River in Taylor County, West Virginia at an existing U.S. Army Corps of Engineers dam. Project construction includes the installation of an intake structure, a 350-foot penstock, a powerhouse, a one-mile transmission line, and other project-related facilities.

The Tygart Project’s original construction commencement deadline of September 26, 1991 was stayed, pending judicial review, to April 15, 1993. Lengthy consultations with the Corps regarding issues such as site access, project design and construction, and power sales contracts led FERC to extend the construction commencement deadline an additional two years, to April 15, 1995. In 1996, Congress legislatively extended the deadline until September 26, 1999 (P.L. 104-246).

Despite these extensions, project construction did not commence by the September 26, 1999 deadline. Consequently, FERC terminated the Project No. 7307 license on April 26, 2000.

On May 8, 2000, Universal Electric Power Corporation filed a preliminary permit application (docketed as Project No. 11840) for the site. FERC has not acted on this permit application.

S. 2028 would reinstate the terminated license and extend the time for construction commencement to December 31, 2007.

The last several Chairmen of the Commission have had a policy of opposing legislation extending commencement of hydropower project construction deadlines that would allow an entity more than 10 years to develop a project. However, that policy has been based on the notion that allowing an entity that is not showing progress in developing a project to control a hydropower site for a greater length of time is not consistent with the public interest in developing clean, renewable hydroelectric energy.

During the time the license was valid, the licensees had more than 11 years to develop this project. However, the Committee received testimony from proponents of the Project regarding the reasons for the delays recent progress towards construction, and the value of the project to the community. FERC has indicated that an updated environmental review of the Project will be conducted pursuant to applicable law.

LEGISLATIVE HISTORY

S. 2028 was introduced by Senators Byrd and Rockefeller on November 11, 2005, and referred to the Committee on Energy and

Natural Resources. The Water and Power Subcommittee held a hearing on S. 2028 on March 30, 2006. At the business meeting on May 24, 2006, the Committee on Energy and Natural Resources ordered S. 2028 favorably reported, with an amendment.

H.R. 4417, the companion measure to this bill, was introduced by Representative Mollohan (D-WV) on November 18, 2005, and referred to the House Energy and Commerce Committee. Legislation to extend the project construction commencement deadline for Project No. 7307 was also considered during the 106th (S. 2942) and 107th (S. 639) Congresses.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in open business session on May 24, 2006, by voice vote of a quorum present, recommends that the Senate pass S. 2028, if amended as described herein. Senator Bingaman asked to be recorded as voting against the measure.

COMMITTEE AMENDMENT

An amendment was adopted to replace references to an “expired” license with one that “has been terminated.”

SECTION-BY-SECTION ANALYSIS

Section 1 directs FERC, upon the request of the licensee for the project numbered 7307, to extend the time required for construction commencement of the project until December 31, 2007, or, if the license for the project has been terminated, the bill would reinstate the license and extend the construction commencement period until December 31, 2007.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office.

S. 2028—A bill to provide for the reinstatement of a license for a certain Federal Energy Regulatory Commission project

S. 2028 would authorize the Federal Energy Regulatory Commission (FERC) to reinstate the license for a hydroelectric project (number 7307) in West Virginia. The bill also would extend the deadline for commencing construction of that project until December 31, 2007.

CBO estimates that implementing S. 2028 would have no net effect on the federal budget. The bill would have a minor impact on FERC’s workload. Because FERC recovers 100 percent of its costs through user fees, any change in its administrative costs would be fully offset by an equal change in the fees that the commission charges. Because FERC’s administrative costs are limited in annual appropriations, the bill would not affect direct spending or revenues.

S. 2028 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act. The bill would benefit the city of Grafton, West Virginia, by authorizing the reinstatement and extension of its license for construction of a hy-

droelectric project. Any costs to the city would be incurred voluntarily.

The CBO staff contact for this estimate is Megan Carroll. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 2028. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 2028, as ordered reported.

EXECUTIVE COMMUNICATIONS

The testimony provided by FERC at the Subcommittee hearing on S. 2028 follows:

STATEMENT OF J. MARK ROBINSON, DIRECTOR, OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION

Madam Chairman and Members of the Subcommittee:

My name is J. Mark Robinson, and I am the director of the Office of Energy Projects at the Federal Energy Regulatory Commission. Our office is responsible for non-federal hydroelectric licensing, administration, and safety; certification of interstate natural gas pipelines and storage facilities; and, authorization and oversight over the construction, operation, and safety of Liquefied Natural Gas (LNG) terminals.

I appear today as a Commission staff witness speaking with the approval of the Chairman of the Commission. The views I express are my own and not necessarily those of the Commission or of any individual Commissioner.

I appreciate the opportunity to comment on S. 2028 and S. 2035. S. 2028 would reinstate the license and extend until December 31, 2007 the deadline for the commencement of project construction for the Tygart Dam Project No. 7307, located in West Virginia. S. 2035 would provide for reinstatement of the license and extend the deadline for the commencement of project construction for the Arrowrock Project No. 4656, located in Idaho, for a three-year period from the enactment of the legislation.

Under Part I of the Federal Power Act (FPA), the Commission issues licenses to non-Federal interests authorizing the construction, operation and maintenance of water power projects on federal lands, on navigable waters of the United States, which utilize the surplus water or water power from a federal dam, and on streams over which the Congress has jurisdiction. Licenses may be issued under

the FPA only if, in the judgment of the Commission, the proposed project is best adapted to a comprehensive plan for the development and utilization of the water resources of the river basin involved for all public purposes. The licenses are issued for terms of up to 50 years and contain terms and conditions that are designed to ensure that the comprehensive development standard is met.

The FPA requires that the licensee will proceed expeditiously with the development and construction of the proposed project once a license has been issued. Section 13 of the FPA requires that construction of a licensed project be commenced within two years of issuance of the license and authorizes the Commission to extend this deadline once, for a maximum of two additional years. If project construction has not commenced by the deadline, the Commission is required to terminate the license

TYGART DAM PROJECT

S. 2028 would authorize the Commission to reinstate the license and extend the deadline for the commencement of project construction for the Tygart Dam Project No. 7307, located in West Virginia, until December 31, 2007.

The Tygart Dam Project was licensed on September 27, 1989, to the City of Grafton, West Virginia (Grafton). The license gave Grafton the maximum two years permitted by Section 13 to start construction—that is, until September 27, 1991.

On December 17, 1990, the Commission issued an order granting partial stays of the licenses for the Tygart Project and 11 other projects in the Ohio River Basin, pending resolution of judicial appeals of the Commission's licensing orders. On April 16, 1992, after the orders were affirmed, the Commission issued an order lifting the stays.

On November 4, 1992, pursuant to a request by Grafton, the Commission extended the deadline for commencement of construction to April 15, 1995. This represented the maximum period for the commencement of construction (two years plus one two-year extension) that the Commission could grant under FPA Section 13.

Subsequent legislation enacted as Public Law No. 104-246 directed the Commission to issue up to three additional two-year orders granting further extensions of time to commence and complete construction. After the Commission did so, September 26, 1999 became the final deadline to commence project construction. On June 23, 1999, Grafton again requested a stay of those license conditions that require pre-construction filings because it was seeking another legislative extension of the commencement of construction deadline. The Commission dismissed this request on February 9, 2000.

Because the licensee did not commence project construction by September 26, 1999, the Commission on November 19, 1999 issued a notice of probable termination of the license for failure to meet the commencement of construction deadline. Grafton did not respond to the notice. The

Commission subsequently terminated the license by order issued on March 27, 2000.

On July 24, 2000, Grafton subsequently filed an application for a preliminary permit for the project, as a predicate for filing a new license application. The Commission issued the requested preliminary permit on March 16, 2001, for the Tygart Dam Project No. 11851 (because the previous license had been terminated, the preliminary permit received a new project number). Grafton made very little progress towards developing the project, and the three-year preliminary permit expired, by its terms, on February 28, 2004. The Commission denied a request for an extension of the preliminary permit term on March 28, 2003.

On March 1, 2004 Grafton filed another application for a preliminary permit for the Tygart Dam Project No. 12490. This application was dismissed on March 28, 2005, for failure to provide additional information related to Grafton's progress towards developing the project. Currently, Grafton has pending before the Commission a third application for a subsequent preliminary permit for the Tygart Dam Project No. 12640. The Commission also has before it a competing application for preliminary permit filed on September 23, 2005, by Tygart LLC for the Tygart Dam Project No. 12613.

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S. 2028 AND S. 2035

I do not support either S. 2028 or S. 2035. Grafton had more than 11 years after license issuance to begin construction on the Tygart Dam Project, following which it failed to make substantial progress during the term of one three-year preliminary permit, and had a second permit application dismissed for the failure to provide adequate information.

The Districts have had more than 16 years after license issuance to start construction of the Arrowrock Project, and have been unable to do so. The licensee has cited numerous reasons for their delays, ranging from inability to obtain financing or a power sales agreement to several technical redesigns of the project.

As a general matter, enactment of bills authorizing or requiring commencement of construction extensions for individual projects leaves the development of an important energy resource in the hands of an entity that has shown an inability to develop a project, and therefore has not been recommended. The last several Chairmen of the Commission have had a policy of opposing legislation extending commencement of construction deadlines that would allow an entity more than 10 years to develop a project. This policy has been based on the notion that allowing an entity that is not showing progress in developing a project to control a hydropower site for a greater length of time is not consistent with the public interest in developing clean, renewable hydroelectric energy.

Recent Commission orders have also noted that the purposes of the provisions of Section 13 of the FPA are to require prompt development of a licensed project. These instances demonstrate why that policy makes sense.

In addition, the record on which the projects were originally licensed in the 1980s, including the examination of environmental and developmental issues, may be out of date in various respects. For example, in the case of the Arrowrock Project, in 1998, after the license was issued, the U.S. Fish and Wildlife Service listed the Columbia River bull trout as a threatened species pursuant to the Endangered Species Act, for the stream on which the project is located. The Service has requested that endangered species consultation be conducted for that project. To ensure that the public interest is served would require not simply reinstating the license and/or extending the license timeframes for commencement of construction, but reexamining and, as necessary, updating the record.

I appreciate the opportunity to present my views to the Subcommittee. Thank you.

MINORITY VIEWS OF SENATOR JEFF BINGAMAN

On September 27, 1989, the Federal Energy Regulatory Commission granted the City of Grafton, West Virginia a license to build the Tygart Dam Hydroelectric Project. Under section 13 of the Federal Power Act, Grafton had two years, until September 27, 1991, to begin construction of the Project. The Commission later granted Grafton two additional years to begin construction, as permitted by section 13. In 1996, Congress legislatively extended the time Grafton had to begin construction by six more years, until September 26, 1999. When Grafton still had not begun construction by then, ten years after the license was originally issued, the Commission terminated the license, as required by section 13.

Subsequently, in March 2001, the Commission granted Grafton a preliminary permit under section 5 of the Federal Power Act. The preliminary permit protected Grafton's claim to the site for three more years while Grafton developed a new license application. Grafton made little progress on the project, and its preliminary permit expired on February 28, 2004. The Commission is now considering competing applications for preliminary permits for the Tygart Dam Project from both the Grafton and another applicant.

S. 2028 would reinstate Grafton's terminated license and extend the deadline for commencing construction until December 31, 2007, notwithstanding section 13 of the Federal Power Act. For the reasons more fully explained in my minority views on S. 2035, which the Committee ordered reported along with S. 2028, I do not support either bill.

Section 13 of the Federal Power Act serves the important public interest in the timely development of licensed hydroelectric power projects. The time limitations in section 13 ensure that licensees who are unable to develop a proposed hydroelectric project cannot tie up the power site indefinitely, preventing others from developing it. *Electric Plant Board of the City of Augusta, Kentucky*, 115 FERC ¶61,198 (May 18, 2006). In the words of the Commission's witness at the Committee's hearing on S. 2028, enactment of legislation waiving the time limitations of section 13 "leaves the development of an important energy resource in the hands of an entity that has shown an inability to develop a project."

Since 1995, the chairmen of the Federal Energy Regulatory Commission have taken the view that ten years is more than enough time for a licensee to begin construction. They have not objected to bills that would extend the deadline for individual projects up to ten years from the issuance of the license, but have consistently objected to bills that would extend the deadline beyond that point. In my view, the Committee should be guided by that policy and should have applied it to S. 2028. The Committee chose otherwise.

The Committee should, of course, be willing to consider whether special circumstances warrant extending the deadline beyond the

ten-year benchmark on a case-by-case basis. But any extension beyond the benchmark, I believe, should bear a heavy burden of persuasion. I can find nothing in the record before the Committee to persuade me that another extension is warranted in this case, and for that reason, have voted against reporting S. 2028.

JEFF BINGAMAN.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill S. 2028, as ordered reported.

